United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

116

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

No. 24355
(Cr. No. 1134-69)

United States of America, Appellee

v.

Samuel J. Armstrong, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Brief for Samuel J. Armstrong,
Appellant.

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* Appellant relies primarily on cases marked with an asterisk.

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

No. 24355
(Cr. NO. 1134-69)

United States of America, — Appellee

v.

Samuel J. Armstrong, — Appellant

Appeal From The United States District Court
For The District Of Columbia

BRIEF FOR SAMUEL J. ARMSTRONG, APPELLANT.

Statement of Issues Presented for Review

In the opinion of the appellant, the following question is presented on this appeal:

Whether the in-court identification made by the Government's chief witness, Bobby Ritz, should have been excluded as a matter of law when there was no possibility of a source independant of the line-up for that witness' identification of appellant Armstrong in view of the unfair, unjust, and prejudicial showing of appellant to the witness, arranged by arresting police officers and when the Government failed to meet its burden of establishing by clear and convincing evidence that the in-court identification had an independent source.

This case has not been before this Court previously.

Reference to Rulings

On October 6, 1969, and prior to trial, appellant, Samuel J. Armstrong, filed a motion to suppress both the pre-trial and in-court identification testimony of the prosecution's chief witness, Bobby Ritz. (Docket, October 6, 1969). That motion was originally scheduled to be heard on November 3, 1969, but the Government was not ready to proceed. That motion was then scheduled to be heard prior to trial and was heard on March 25, 1970. (Docket, November 3, 1969). Just prior to trial, the court below ruled that the motion to suppress the identification made at the time of appellant's arrest would be granted. The Court further ruled

that the witness Ritz would be permitted to make an identification in open court finding that there was an independent basis for Ritz's in-court identification. (Motion to Suppress, Tr., p. 32-33). This appeal presents the questions of whether or not the ruling in the Court below was correct as a matter of law and whether the Government did fail to establish by clear and convincing evidence an independent source for the in-court identification.

Statement of the Case

By an indictment filed July 18, 1969, in the Court below, appellant Armstrong was charged with burglary and larceny of two television sets and one watch of a value of $830.00. Trial was held on March 25 and 26, 1970. A jury found Armstrong guilty on both counts. On May 14, 1970, he was sentenced to from two to six years on both counts to run concurrently.

The testimony on behalf of the prosecution in the Court below was to the effect that appellant, on April 28, 1969, along with four or five other individuals, proceeded by automobile to the Jeffrey Gardens Apartments located at 4243 Barnaby Road, S.E., Washington, D.C. where the burglary took place. The Court below took judicial notice of the fact that April 28, 1969 was a Monday. (M to S, Tr., p. 7).[1] Bobby Ritz passed through the basement of the Jeffrey Gardens Apartments and saw the burglars there with the two television sets. Ritz was frightened, did not look at them other than with a passing glimpse, and quickly passed by and out of sight. (M to S , Tr. p. 18). The witness did notice that one of the burglars was wearing yellow clothing. (M to S, Tr., p.20).

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[1] Motion to Suppress hearing transcript.

The television sets were removed from the basement and placed in a white 1962 Thunderbird bearing D.C. tag 716-997. (Tr. 33). The white Thunderbird then proceeded to 811 Xenia Street, S.E. As soon as the burglars left the apartment, the police were notified and subsequently issued a broadcast for the get-away car over the police radio. The first broadcast went out at approxiamtely 3:00 pm. (M to S, Tr. 9). Ritz, the chief prosecution witness, testified that the burglary took place at approximately 1:30 pm. (M to S, Tr. p 17-18).

The police traced the listing of the automobile tag to Lawrence Boone of 811 Xenia Street, S.E., Washington, D.C. The police proceeded to that address and upon seeing a 1962 Thunderbird (M to S, Tr. 4-5), parked outside, went into the house and arrested the occupants. (M to S, Tr. 50, 57-58). Among those arrested was Samuel J. Armstrong. He, along with four or five others, was handcuffed and taken out in front of the apartment on the street beside the white 1962 Thunderbird. (M to S, Tr. 5, 8, and 14-15). Two television sets recovered in the apartment were placed nearby on the street. Both uniformed and plainclothes police officers and marked and unmarked police cruisers were at this location.

Ritz, and a second witness named Dennis Harris were picked up in a marked police cruiser at the Jeffrey Gardens Apartments and brought together to 811 Xenia Street, S.E. for the purpose of identifying the arrested individuals. (M to S, Tr. 5, 7-8, Tr. 34). Both witnesses were in the police cruiser together and saw and identified Armstrong together. (M to S, Tr. 8, 14-16). The witness understood that he was being brought to identify Armstrong and saw him standing in the presence of police officers near the white Thunderbird get-away car and the television sets when he identified him. (M to S, Tr. p 15, 16, Tr. 35).

At the time witness Ritz made the identification, only Armstrong was wearing yellow. Mr. Ritz actually identified the yellow clothing and concurrently obtained a good look and mental picture of Mr. Armstrong for the first time. (M to S Tr., 16, 22, 23, 32). The witness was frightened at the time of the robbery and did not look at the burglars. (M to S Tr., 17, 18, Tr. 43). At the time of the identification, he felt safe and had a long good look at Armstrong. (M to S, Tr. 23).

Ritz identified Armstrong and then was taken back by the police to the Jeffrey Gardens Apartments. Armstrong was taken to jail and locked up.

Both Ritz and Armstrong, as well as the other identifying witness, were in good health. (M to S, Tr. 8-9, 16). Testimony on behalf of the Government indicated that there was a police station as close as two miles away. (M to S, Tr. 7). Neither identifying witness indicated that they would not be willing to travel to the police station. (M to S, Tr. 16).

At the trial in the Court below, the Government stipulated that there was no counsel present for Armstrong at the line-up. (M to S, Tr. 25).

Armstrong testified at the trial that he had driven the white Thunderbird to the Jeffrey Gardens Apartments, but that he had not gone inside nor did he have any knowledge of what was taking place inside. (Tr. 66, 70). He testified that he had been advised by his friends that the televisions were being picked up for one of the friends who was getting married. (Tr. 65,77). Armstrong denied any part in the offenses charged. (Tr. 70). Tyrone Neveson, one of the burglars, testified Armstrong never entered the building and did not know what was taking place. (Tr. 117, 119).

Argument

The prosecution's chief witness, Ritz, should not have been allowed to make an in-court identification of Armstrong since Ritz could not possibly have had an independent recollection of appellant. The Government did not meet its burden of showing by clear and convincing evidence an independent source for his in-court identification. The record does not support a finding of an independent source, and therefore, the witness should not have been allowed to identify Armstrong in open court. The facts produced during the hearing on the Motion to Suppress support the conclusion that Ritz's in-court identification should have been excluded as a matter of law.

Appellant's Constitutional Right to Counsel was Denied by Arresting Police Officers

In connection with this point, appellant requests this Court to read the following transcript reference: Motion to Suppress Transcript, Page 25.

The United States Supreme Court has held that an arrested individual has a Constitutional right to counsel under the Sixth Amendment when police arrange for witnesses to a crime to view a suspected individual. Wade v. United States, 388 U.S. 218, (1967); Clemons v. United States, 133 U.S. App. D.C. _____, 408 F 2d 1230 (1968). The circumstances surrounding the observation of this appellant by the witnesses clearly demonstrate Armstrong's need for counsel. There is no indication that Appellant Armstrong waived his right to counsel. The Government stipulated that appellant did not have counsel at the confrontation between Ritz and Armstrong (M to S, Tr. 25).

This Court considered the right to counsel in connection with police identification procedures in Clemons v. United States, supra. The Court said:

> "... It would appear, however, that the Supreme Court has, at the least, cast an unmistakable shadow across those post-arrest single confrontations at the police station where formal lineups are a feasible alternative. For the future, of course, all such post-incarceration exposures, singly or in lineup, are subject to the protections of the Sixth Amendment right to counsel, and many of the problems we face today will be nonexistent..." 408 F 2d at p. 1237.

The District Court for the District of Columbia has ruled that where an arrested suspect is shown to a witness of a crime approximately 40 to 45 minutes after the alleged crime was committed, the suspect is entitled to counsel. United States v. Kinnard, 294 F.Supp. 286 (D.C. 1968). The court said that:

> "... An on-scene identification after arrest is a critical stage of the proceeding and the defendant appears under Wade to be entitled to counsel and a formal line-up. In short, where arrest has taken place, subsequent identification must be attempted only after defendant has counsel and a line-up can be arranged. Most reluctantly the Court is required to suppress the identification..." 294 F.Supp. at p. 289.

The Fifth Circuit has held that an arrested suspect is entitled to counsel prior to any confrontation with witnesses to the crime. Rivers v. United States, 400 F 2d 935 (5th Cir. 1958). The Court in that case said:

> "... With Miranda on the books, it is indisputable that most, perhaps all, confrontations occuring after arrest will fall within the rules announced in Wade and Gilbert. We recognize the risk of ever letting a dissenter speak momentarily for the Court as to what it has really held, but Mr. Justice White, dissenting in Wade said 'the rule applies to any line-up, to any other techniques employed to produce an identification, and a fortiori to a face-to-face encounter between the witness and the suspect alone, regardless of when the identification occurs, in time or place, and whether before or after indictment or information' " 400 F 2d at 939.

The Seventh Circuit has held that a line-up conducted without counsel present for the accused, in the absence of a waiver of counsel by the accused, violates the accused's Sixth Amendment right to counsel. United States v. Broadhead, 413 F 2d 1351 (7th Cir. 1969).

The facts and law in this case clearly establish that appellant was entitled to counsel prior to being shown to witness Ritz. Since counsel was not provided, appellant is entitled to have the identification testimony of Ritz suppressed. If a witness is allowed to identify an accused in court after the police have violated that same individual's constitutional right to counsel, there is no reason for the police to comply with his right to counsel.

Appellant's Presentation by Police Officers to Identifying Witnesses Was so Suggestive as to Violate Due Process

In connection with this point, appellant requests this Court to read the following transcript references: Motion to Suppress Transcript pages 5, 7-8, 14-18, 20, 22-23, 26 and Trial Record pages 29, 32, 34-36, 52-53.

This appellant was not presented to the witnesses in a manner which would require them to pick him out from among other individuals. There were five individuals arrested by the police (M to S, Tr. 5, 8, 14-15). Four were Negro and one was white. (Tr. 52-53). The witness indicated that there were three or four burglars (Tr. 29). There were four arrested and handcuffed Negroes presented to the witnesses for identification. The arrested individuals were not dressed similarly. The witness knew the individuals had been arrested. (M to S, Tr. 14-15). It was obvious they were in police custody. The arrested individuals were near the get-away car. (M to S, Tr. 15). The stolen television sets were in plain view. (M to S, Tr. 16).

To show a single suspect to a witness and to ask if the witness can make an identification presents the possibility of a violation of due process. Stovall v. Denno, 388 U.S. 293 (1967); Wise v. United States, 127 U.S. App. D.C. 279, 383 F 2d 206 (D.C. Cir. 1967), cert. denied, 390 U.S. 964 (1968). While it is true that there was more than one individual present to be observed by the witness, the group of individuals constituted the group of burglars suspected and arrested by police. Each individual present was a suspect. Each individual present was under arrest.

This Court approved 10 questions to be used in determining whether or not the presentation of a single suspect under arrest to a witness is

violative of due process.[2] Clemons, v. United States, supra. The facts in this case show that appellant Armstrong along with the other arrested individuals were the only ones shown to the witness and were the only ones who could be identified. There were no other individuals nearby who could have been identified by the witness. The confrontation took place at the place of the arrest of this appellant (M to S, Tr. 5, 7-8, Tr. 34). There were no compelling reasons for a prompt confrontation so as to deprive the police of the opportunity to secure other individuals for the purpose of holding a line-up. (M to S, Tr. 7, 8-9, 16). Each witness was in the presence of the other and heard the other make the identification of appellant (M to S, Tr. 7-8, 14-15, 16; Tr. 34). The get-away car and stolen television sets were present where they could be observed by the witnesses while observing Armstrong. (M to S, Tr. 15-16, Tr. 35). The

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[2] The ten questions are found in footnote 16 on page 1245 of the opinion in the Clemons case, supra, and are as follows:

"1. Was the defendant the only individual that could possibly be identified as the guilty party by the complaining witness, or were there others near him at the time of the confrontation so as to negate the assertion that he was shown alone to the witness?

"2. Where did the confrontation take place?...

"3. Were there any compelling reasons for a prompt confrontation so as to deprive the police of the opportunity of securing other similar individuals for the purpose of holding a lineup?...

(continued on following page)

identification was not of the appellant but of his clothing. (M to S, Tr. 16, 22, 23, 32). The emotional state of witness Ritz was such as to preclude objective identification. (M to S, Tr. 18). Witness Ritz understood he was present to identify appellant. (M to S, Tr. 15). The observation of Armstrong by witness Ritz was so limited as to render him particularly amenable to suggestion.

In Russel v. United States, 133 U.S. App.D.C. _____, 408 F 2d 1280 (D.C. Cir. 1969), it was said:

> "Unquestionably, confrontations in which a single suspect is viewed in the custody of the police are highly suggestive. Whatever the police actually say to the viewer, it must be apparent to him that they think they

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(continued from previous page)

> "4. Was the witness aware of any observation by another or other evidence indicating the guilt of the suspect at the time of the confrontation?...
>
> "5. Were any tangible objects related to the offense placed before the witness that would encourage identification?...
>
> "6. Was the witness' identification based on only part of the suspect's total personality?...
>
> "7. Was the identification a product of mutual reinforcement of opinion among witnesses simultaneously viewing the suspect?...
>
> "8. Was the emotional state of the witness such as to preclude objective identification?...
>
> "9. Were any statements made to the witness prior to the identification indicating to him that the police were sure of the suspect's guilt?...
>
> "10. Was the witness' observation of the offender so limited as to render him particularly amenable to suggestion, or was his observation and recollection of the offender so clear as to insulate him from a tendency to identify on less than a positive basis?"

> have caught the villain. Doubtless a man seen in handcuffs or through the grill of a police wagon looks more like a crook than the same man standing at ease and at liberty. There may also be unconscious or overt pressures on the witness to cooperate with the police by confirming their suspicions. And the viewer may have been emotionally unsettled by the experience of the fresh offense." 408 F 2d at page 1284.

In that case, the Court allowed the identification based upon its particular facts. The Court noted that the arrest had been made at 5 o'clock in the morning and that long delay would be involved in obtaining counsel. In this case, the arrest was made during normal office hours for attorneys on a weekday, i.e., Monday at 3:25 pm. (M to S, Tr. 7). There would have been only a minor delay in obtaining counsel and arranging for a formal line-up which could have been conducted fairly.

This Court in Wise, supra, said:

> "... The presentation of only one suspect, in the custody of police, raises problems of suggestibility that bring us to the threshold of an issue of fairness..." 383 F 2d at page 209.

In that case the complainant chased the appellant and never lost sight of him. Upon those facts the Court concluded that identification was proper. In this case there was no pursuit of the arrested individuals or this defendant. There was no chase. The witness did lose sight of the alleged burglars for at least one hour.

The evidence presented does not support the finding of an independent source for the recollection of the appellant by witness Ritz.

Ritz saw the yellow clothing worn by one of the burglars. (M to S, Tr. 16, 32). Ritz also noticed that the individual with the yellow clothing had a light complexion. (M to S, Tr. 20, 26). Ritz did not notice any other physical feature of this individual or, at the least, the Government chose not to ask Ritz about it. Ritz was confused as to whether or not he gave a description to the police. (M to S, Tr. 18, 26, Tr. 36). In any event, the Government chose not to ask Ritz about it or produce a police officer to whom the description was given. The logical inference and presumption is that if there was such a description given by Ritz to the police, it would have been unfavorable to the Government. Appellant, of course, had no obligation to pursue this matter since the burden was on the Government to show an independent source by clear and convincing evidence. Ritz also had the opportunity to observe appellant in the courtroom during the hearing on the Motion to Suppress the identification by Ritz and he understood that he was there to identify appellant. (M to S, Tr. 17).

Conclusion

The facts in this case show that the confrontation was so conducive to irreparable mistaken identification that the appellant was denied due process. The Government failed in its burden of showing

an independent source for the courtroom identification by witness Ritz. The identification by witness Ritz should have been suppressed as a matter of law. Therefore, it is submitted that the judgment below should be reversed and an acquittal entered.

Respectfully submitted,

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Attorney for the Appellant appointed by
this Court.

BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. [illegible]

UNITED STATES OF AMERICA, APPELLEE

v.

[illegible] ARMSTRONG, APPELLANT

Appeal from the United States District Court for the District of Columbia

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THOMAS A. [illegible],
United States Attorney.

JOHN A. [illegible],
CHARLES F. [illegible],
[illegible],
Assistant United States Attorneys.

Cr. No. [illegible]-55

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OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUE PRESENTED *

In the opinion of appellee, the following issue is presented:

Whether the record supports the finding of the trial judge that there was an independent source for the in-court identification of appellant?

* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,355

UNITED STATES OF AMERICA, APPELLEE

v.

SAMUEL ARMSTRONG, APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed July 18, 1969, appellant was charged with burglary in the second degree (22 D.C. Code § 1801) and grand larceny (22 D.C. Code § 2201). On March 25, 1970, after a pre-trial hearing on appellant's motion to suppress identification testimony, trial was held before the Honorable John Lewis Smith, Jr., sitting with a jury. The following day appellant was found guilty as charged, and on May 14, 1970, he was sentenced to a term of two to six years on each count, the sentences to run concurrently. This appeal followed.

The Pre-Trial Hearing

Officer Lonnie Kispaugh of the Metropolitan Police testified that at 3:05 p.m. on April 28, 1969, he and his two partners, Officer James Rohls and Sergeant Richard Simmonds, were cruising in a private car when they monitored a radio run for a burglary in progress at 4243 Barnaby Street, Southeast. While responding to the Barnaby Street address, they monitored a lookout for a white 1962 Thunderbird bearing D.C. tags 716-997, owned by one Laurence Boone of 811 Xenia Street, Southeast, in connection with the burglary. The officers thereupon went directly to the Xenia Street address and were met there at around 3:15 p.m. by Officer Joseph Maddox and another uniformed officer, who had arrived together in a scout car. The 1962 Thunderbird mentioned in the lookout was parked directly in front of 811 Xenia Street. While the two uniformed officers went to the front door, Officer Kispaugh and his two partners proceeded towards the rear of the address. Before they reached the rear of the house, however, four or five men ran out the back door and were immediately apprehended alongside and in front of the building. Appellant, dressed in a yellow shirt and yellow and blue checked trousers, and one Tyrone Neverson were among those captured (Tr. 3-13).

Mr. Bobby Rich, employed as a janitor at the Jeffrey Gardens Apartments, 4243 Barnaby Street, Southeast, testified that at 1:30 p.m. on April 28, while walking through the laundry room at the Barnaby Street address, he observed four or five men standing in the room and a television set lying on the floor (Tr. 17). One of the men was clad in green, another in blue, and a third man had on a yellow outfit. Rich's attention was drawn to the third individual because of the yellow shirt and "loud yellow pants" (Tr. 19-20). Rich also noticed that the complexion of this man in yellow appeared lighter than the others, and his facial features had a "reddish" tinge (Tr. 20-21, 26). Glancing around at the men in the

room, Rich "slowly" began walking towards the back door (Tr. 18). However, Rich's path was blocked at the door by the man in the yellow outfit, who had placed his arm across the doorway (Tr. 18). Standing "face to face" with this individual, Rich exclaimed, "Excuse me, please" (Tr. 18, 23, 26). The arm, however, remained across the door. Finally, after standing there for two minutes, the man in yellow lowered his arm and allowed Rich to exit. Rich immediately located Mr. Harris, the resident manager, and the police were called (Tr. 18, 26). Shortly thereafter, while standing outside the resident manager's office, Rich noticed a white Thunderbird pass by. In this car on the rear seat was the television set he had seen earlier on the floor in the laundry room. Although Rich recognized the driver of the Thunderbird as one of the men he had seen earlier in the laundry room, he could not specifically identify appellant at trial as the driver (Tr. 18, 21, 25-26).

Shortly before 3:43 p.m. Rich and Harris were brought by other police officers to 811 Xenia Street, Southeast. Alighting from the police cruiser, Rich saw six handcuffed men standing on the sidewalk. The white Thunderbird and two television sets were also visible. Rich recognized and identified the handcuffed individual wearing a loud yellow shirt and yellow pants as one of the men he had seen earlier in the laundry room (Tr. 12, 14-16). At the pre-trial hearing Rich identified appellant as the same man that he had encountered in the laundry room dressed in yellow on April 28 (Tr. 15, 27). He further testified that even if he had not seen appellant at 811 Xenia Street and had not seen him since the incident in the laundry room, he still would be able to identify appellant in the courtroom on the day of trial (Tr. 22, 26).

The court held inadmissible the pre-trial identification of appellant at the scene of the arrest but ruled that an in-court identification by Mr. Rich would be allowed. The trial judge reasoned that while the pre-trial identification was not sufficiently contemporaneous, Rich's

testimony revealed an independent basis for his in-court identification (Tr. 32-33).

The Trial

The Government's Case

Walter Scott and his wife Mary both testified that they left their apartment (4243 Barnaby Road,[1] Southeast, Apartment 201) with their two sons around 8:00 a.m. on April 28, and returned home again around 6:00 p.m. to find their apartment ransacked. Noticeably absent from the apartment were two television sets, a Zenith portable and a 21-inch General Electric console. Also missing were Mrs. Scott's watch and a sweater belonging to her husband. Mr. Scott subsequently identified the stolen property at the police station,[2] where combined pictures were taken of the property and Mr. Scott. Neither Mr. nor Mrs. Scott knew appellant, nor did they give him permission to enter their apartment on April 28 (Tr. 16-26).

After substantially repeating his earlier testimony at the pre-trial hearing about the incident in the laundry room, Bobby Rich unequivocally identified appellant as one of the men he had seen there (Tr. 30-31, 45).[3] Although impeached by a prior inconsistent statement made at the preliminary hearing, where he had testified that he had recognized appellant as the driver of the Thunderbird, Rich nevertheless remained adamant in his testimony on the trial date that he was not sure if appellant was the driver (Tr. 38-39, 46).

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[1] Barnaby Street is also occasionally referred to throughout the transcript as Barnaby Road.

[2] Except for Mr. Scott's sweater, which was found in the basement of his apartment building, all the missing property was retrieved by the Scotts at the police station (Tr. 20).

[3] Rich testified at trial that there were three to four men in the laundry room (Tr. 29), but at the pre-trial hearing he had estimated that there were four or five men (Tr. 17).

Both Sergeant Simmonds and Officer Maddox testified that they arrested appellant and Neverson on Xenia Street. From inside of 811 Xenia Street Simmonds seized the two television sets taken in the burglary (Tr. 47-56). Maddox recovered Mrs. Scott's watch from Neverson's trouser pocket (Tr. 26, 56-63).

The Defense Case

Appellant testified that a friend, Samuel Hughes, needed some help in moving a television and hi-fi set from an apartment on Barnaby Street, and that he had agreed to drive the car for Hughes. While the others entered the apartment building, appellant remained in the Thunderbird. After the two televisions were placed in the back seat, appellant drove the car back to Lawrence Boone's house on Xenia Street. Appellant denied any knowledge of the burglary (Tr. 66-109).

Neverson admitted his complicity in the burglary.[4] He further testified that appellant remained in the car while he and two other individuals entered the apartment building on Barnaby Street. Neverson did not know whether appellant had any knowledge of the burglary (Tr. 121-137, 135-138).

ARGUMENT

The in-court identification of appellant by the eyewitness had an independent source.

(Tr. 18-26)

Appellant assigns as error the trial court's refusal to suppress Rich's in-court identification on the ground that there was no independent source for that identification. He contends that the absence of independent source is evidenced by Rich's poor opportunity to observe appellant and the employment of an unnecessarily suggestive on-the-scene confrontation with appellant shortly after

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[4] Neverson had previously pleaded guilty to attempted burglary (Tr. 118).

his arrest.[5] By denying appellant's motion to suppress, the trial court to the contrary found that Rich's opportunity and ability to observe appellant at the scene of the burglary provided an independent basis for his in-court identification.

The record adequately supports the conclusion that clear and convincing evidence of an independent source was abundant. *See Clemons* v. *United States*, 133 U.S. App. D.C. 27, 408 F.2d 1230 (1968) *(en banc)*, *cert. denied*, 394 U.S. 964 (1969). Mr. Rich testified that he walked "slowly" through the laundry room and glanced around at the men in the room (Tr. 18). However, his attention was specifically drawn to appellant because of his "loud yellow pants" and yellow shirt (Tr. 20). In addition, Rich was able to discern that while the other men's complexions appeared dark, appellant's features were lighter and had a "reddish" tinge (Tr. 20-21, 26). When Rich attempted to exit from the laundry room via the back door, his path was blocked by appellant, who had placed his arm across the doorway. Rich paused, and while standing "face to face" with appellant (Tr. 23), Rich said, "Excuse me, please" (Tr. 18, 26). However, not until after a two minute

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[5] While the trial court suppressed the on-the-scene identification on the ground that it was not contemporaneous, it is apparent that additional evidence adduced at trial may have discredited Rich's estimation that the burglary occurred around 1:30 p.m. (Tr. 17). Neverson testified at trial that the burglary occurred around 3:00 p.m. (Tr. 120). In addition, the testimony of Sergeant Simmonds and Officer Maddox was consistent with Officer Kispaugh's statement that he monitored a radio run a little after 3:00 p.m. for a burglary in progress or burglars leaving the scene of 4243 Barnaby Road, Southeast (Tr. 4, 11, 49, 57). Given the fact that Rich's identification of appellant occurred before 3:43 p.m. (Tr. 12), we submit that this prompt on-the-scene confrontation was permissible. *Cunningham* v. *United States*, D.C. Cir. No. 23,176, decided November 23, 1970; *Stewart* v. *United States*, 135 U.S. App. D.C. 274, 418 F.2d 1110 (1969); *Russell* v. *United States*, 133 U.S. App. D.C. 77, 408 F.2d 1280, *cert. denied*, 395 U.S. 928 (1969). This on-the-scene identification was not referred to at trial, and in any event we submit that there was an independent source for the in-court identification.

stand-off did appellant lower his arm and allow Rich to depart. Not only was Rich able to observe appellant's face, features and clothing for a period well over two minutes, but in addition his observations enabled him to give appellant's description to the police (Tr. 26). Standing at such close quarters with appellant for over two minutes certainly gave Rich ample opportunity to observe the burglar. *Sutton* v. *United States*, D.C. Cir. No. 22,210, decided August 19, 1970, slip op. at 5 nn.5 & 6; *(Anthony) Long* v. *United States*, 137 U.S. App. D.C. 311, 424 F.2d 799 (1969).

The facts relating to Rich's opportunity for accurate observation were exhaustively explored at the pre-trial hearing. In addition to Rich's testimony that he could pick appellant out of a crowd even if he had not seen him since the encounter in the laundry room (Tr. 22), the colloquy between Rich and the trial judge supports the court's finding of independent source:

> THE COURT: Now, if you had not seen him at the scene of the arrest where you identified him, would you be able to identify him here in this courtroom today?
>
> THE WITNESS: Yes.
>
> THE COURT: There is no question in your mind about that?
>
> THE WITNESS: Right. (Tr. 26).

It was the court's function to determine whether there was an independent source for the in-court identification, and its finding was consistent with the evidence. *See United States* v. *Sera-Leyva*, —— U.S. App. D.C. ——, 433 F.2d 534 (1970). In seeking to have this finding reversed appellant must shoulder a heavy burden, *United States* v. *(Clinton) Long*, 137 U.S. App. D.C. 275, 278, 422 F.2d 712, 715 (1970), since the trial court's finding of an independent source can be reversed only if "clearly erroneous." *(Anthony) Long* v. *United States*, *supra*. On the instant record appellant has failed to meet his burden.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,355
(Cr. No. 1134-69)

United States of America, Appellee

v.

Samuel J. Armstrong, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Reply Brief for Samuel J. Armstrong, Appellant

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,355

UNITED STATES OF AMERICA, Appellee,

v.

SAMUEL ARMSTRONG, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR SAMUEL J. ARMSTRONG, APPELLANT

The Government seeks to sustain the adequacy of the in-court identification by the witness Rich, upon whose testimony the conviction rests. He was the only witness in the prosecution's case who connected Armstrong with the crime.

In United States v. Sera-Leyva, U.S.App.D.C. , 433 F. 2d 534 (1970), after a remand for supplemental hearing, the Court noted that

the trial Court had found that the pretrial identifications did not occur under such circumstances as to violate due process. In the case at bar the Court excluded the pretrial identification because it did violate due process. In the Sera-Leyva case the Court noted that the in-court identification by the victim was unusually strong and that this was strengthened by the evidence taken on the supplemental hearing following remand.

In Sera-Leyva v. United States, 133 U.S.App.D.C.125, 409 F.2d 160 (1969) the Court (at page 163) noted that there was an absence in the record of a detailed description by the identifying witness prior to the confrontation issue, an important factor in reaching the determination of whether the in-court identification is an acceptable basis to support a conviction.

There was no identification instruction which Macklin v. United States, 133 U.S.App.D.C.139, 409 F.2d 174 (1969) required as a matter of course.

While witnesses in Sutton v. United States, U.S.App.D.C. , F.2d (decided August 19, 1970) obtained only brief glimpses of one of the defendants, that testimony was not shaken by cross-examination. Here the witness Rich was unable to say whether or not the defendant was the driver of the white Thunderbird although his observation of the car was obviously within minutes of the first encounter. Rich was questioned about his testimony at the preliminary hearing on May 7, about ten days

after the burglary. He was unable to remember whether he had testified at that hearing as to whether Armstrong was the driver of the car or not. He was unable to remember whether Armstrong was or was not the driver of the car although it passed him and he was able to see its contents. (Tr. 38-39)

It is submitted that the in-court identification by the witness Rich in this case rests upon far too dubious a base to permit its use by the prosecution. Where the witness was unable to remember whether or not Armstrong was the driver of the car, certainly an important factor in the whole transaction, it seems inescapable that his identification rests more largely, if not entirely, upon his viewing of the handcuffed participants in the presence of the white Thunderbird and the stolen television sets which the witness recognized since he had worked on at least one of them at an earlier point of time. (M.to S. Tr. 14-16) (Tr. 35)

In Anthony Long v. United States, 137 U.S.App.D.C. 311, 424 F.2d 799, the Court noted that the requirement for convincing evidence that in-court identification was based upon other observations of the suspect than the line-up identification would be satisfied, if, it is shown that prior to the tainted confrontation the witness was capable of making a spontaneous identification of the suspect based upon his observations at the time of the offense. But time and the manner in which the line-up occurred in this case made it totally impossible to apply that test. It is

more probable that the in-court identification rested upon the unhurried viewing of Armstrong at the latter confrontation under the protective arm of the police authorities.

The situation here is quite different from United States v. Kemper, U.S.App.D.C. 433 F.2d 1153(decided July 10, 1970) where the witness had an opportunity to view the suspect over a period of approximately ten minutes and later furnished the police a detailed description of the man which was a reasonably accurate portrayal of the suspect including scars on his face. Nothing approaching that support for the independent identification is found in the record here. It is submitted that the Government has not met the burden of producing clear and convincing evidence of an independent source for Rich's courtroom identification of Armstrong.

The judgment below should be reversed.

Respectfully,

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